

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ROBERT R. BLYSTONE and CARLA  
BLYSTONE, husband and wife, and the marital  
community comprised thereof,

Plaintiffs,

v.

CITY OF TACOMA, a Washington municipal  
corporation, JOSEPH BUNDY and PAMELA  
RUSH, husband and wife, and the marital  
community comprised thereof,

Defendants.

JOSEPH BUNDY and PAMELA RUSH,  
husband and wife,

Counter-claimants and  
Third-Party Plaintiffs,

v.

THE CITY OF TACOMA, a municipal  
corporation; ROBERT J. BLYSTONE and  
CARLA BLYSTONE, husband and wife;  
LEROY PARDINI and PATRICIA KARNAY,  
husband and wife,

Third-Party Defendants.

Case No. C04-5535FDB

ORDER DENYING CITY OF  
TACOMA'S MOTION FOR  
SUMMARY JUDGMENT AGAINST  
THIRD-PARTY PLAINTIFFS  
JOSEPH BUNDY AND PAMELA  
RUSH

1 This matter arises out of an incident occurring on July 20, 2002 when Third-Party Defendant  
2 Pardini refused to drive his car over a “transition plate” on Pacific Avenue near a construction site in  
3 Tacoma. The City of Tacoma (City) moves for summary judgment on the third-party claims asserted  
4 by Third-Party Plaintiffs Bundy against the City and Third-Party Defendants Blystone.

5 Joseph Bundy is a police officer with the Tacoma Police Department (TPD) who was off-  
6 duty working police security/traffic control for the construction company at a Pacific Avenue  
7 construction site where the light rail was being installed. Bundy was assisting a flagman in directing  
8 traffic through a construction area marked by barricades and cones where vehicles were directed  
9 across a gradual transition ramp. Bundy was in full uniform, in a patrol car, with lights activated.

10 Robert Blystone is a sergeant with the Tacoma Police Department.

11 The construction project was for the light rail system. The area where the incident occurred  
12 was between the Harmon Brewery and 21<sup>st</sup> Street, and the transition plate went over the light rail  
13 project in this area. [Bundy Dep. p. 54-55.] When Pardini approached the transition plate at  
14 approximately 0035 hrs on July 20, 2002, he refused to cross the transition ramp as directed by the  
15 flagman. The flagman testified that Pardini began to cuss at him, then said he was going to back up.  
16 [Fleming Dep. p. 19] The flagman told him that he could not because there was traffic behind him, so  
17 Pardini backed to the side then started out again toward the flagman who jumped out of the way. [*Id.*  
18 19-20.] Pardini then stopped, and Bundy exited his police vehicle and came over. [*Id.* p. 20.] Bundy  
19 told Pardini that he was under arrest for vehicular assault, to shut off the engine, and to exit the  
20 vehicle. Bundy alleges that Pardini belligerently confronted him asserting that he was an architect,  
21 that he owned all the buildings around the area, that his car cost \$70,000, and if he so much as  
22 scratched it he would sue him. [Bundy Decl. 3-4.] Bundy also alleges that Pardini asked him several  
23 times “What would it take to make this go away?” [Bundy Compl., p. 4; Decl. of Luxenberg, p. 22-  
24 24.] Bundy handcuffed Pardini, who remained in his vehicle. During this time, according to the  
25 flagman, Pardini’s wife, who was also in the car, got out after her husband’s arrest and began hitting

1 and pushing Bundy. [Fleming Dep. 25-26.] Bundy called for back-up, and eventually secured Pardini  
2 in the back of his patrol vehicle. [Bundy Decl. p. 4; Luxenberg Decl. p. 22.] Bundy then went to  
3 Pardini's car to get the license plate number, and as he was reading the license number through a  
4 shoulder mike radio, Pardini's wife grabbed the mike and screamed into it. [Bundy Decl. p. 4.]

5 Sergeant Blystone arrived and Bundy told him what had occurred. Pardini's wife interjected  
6 with her version of events. Another officer, TPD Officer Verone was instructed to conduct a DUI  
7 investigation, but when Pardini invoked his Miranda rights, Blystone told him he could no longer go  
8 forward with the DUI investigation. Bundy and the City agree that Blystone ordered Bundy to write  
9 Pardini a criminal citation for reckless driving and to release Pardini. The parties also agree that  
10 Pardini asked to speak to Blystone away from Bundy. Blystone directed Bundy to write up the  
11 criminal citation for Pardini to sign and have it ready by the time they returned. It is undisputed that  
12 Blystone then walked several feet away and talked with Pardini and his wife. Blystone contends that  
13 he talked with his supervisor Lieutenant Barbara Justice about the appropriate charges for the  
14 incident, they agreed that neither vehicular assault nor reckless driving, which includes the element of  
15 "willful and wanton disregard," were appropriate, and they agreed that a report for the prosecutor's  
16 review would be written by Bundy and the prosecutor could file charges if appropriate. [Blystone  
17 Dep. P. 30:9-23; 52:11-24.] Pardini was subsequently charged by the City with the criminal offense  
18 of disobeying a flag person. [Pardini dep. pp. 8:18-9:12; 246:18-20.)

19 Blystone took issue with Bundy's report because the report "contained several untruths and it  
20 accused me of bribery." [Blystone Dep. p. 64:13-18.] Blystone filed a complaint against Bundy  
21 through his chain of command. [Blystone Dep. pp. 77:24- 78:23.]

22 Bundy asserts that he was retaliated against almost immediately because Blystone showed his  
23 report to other officers. Lt. Justice asked Bundy to report to her office, that she and Sgt. Yuhasz  
24 were there to issue him a notice of an Internal Affairs complaint by Blystone. Bundy told Justice that  
25 he was following the whistleblower policy and had advised two supervisors of what he believed was

1 an improper government act.

## 2 SUMMARY JUDGMENT STANDARD

3 Summary judgment is proper if the moving party establishes that there are no genuine  
4 issues of material fact and it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the  
5 moving party shows that there are no genuine issues of material fact, the non-moving party must go  
6 beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477  
7 U.S. 317, 322-323 (1986). Inferences drawn from the facts are viewed in favor of the non-moving  
8 party. *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 630-31 (9<sup>th</sup> Cir. 1987).

9 Summary judgment is proper if a defendant shows that there is no evidence supporting an  
10 element essential to a plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Failure of  
11 proof as to any essential element of plaintiff's claims means that no genuine issue of material fact can  
12 exist and summary judgment is mandated. *Celotex*, 477 U.S. 317, 322-23 (1986). The nonmoving  
13 party "must do more than show there is some metaphysical doubt as to the material facts."  
14 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

## 15 DISCUSSION

16 Bundy claims that he was retaliated against when he exercised his constitutionally protected  
17 First Amendment right in reporting suspected highly irregular or illegal conduct of his superior  
18 Blystone.

19 The City asserts that Bundy was disciplined, but not because he reported what he claims he  
20 believed was possible misconduct. The City contends that TPD disciplined Bundy because (a) his  
21 report was inaccurate, included improper and unsubstantiated personal speculation and opinion, and  
22 violated TPD policy; and (b) he was insubordinate (publicly undermining and disparaging Blystone in  
23 front of a citizen), discourteous, and failed to perform his job in a satisfactory manner in connection  
24 with the subject incident.

25 In order to state a claim against a governmental employer for violation of the

1 First Amendment, an employee must show (1) that he or she engaged in protected  
2 speech; (2) that the employer took 'adverse employment action'; and (3) that his or  
her speech was a 'substantial or motivating' factor for adverse employment action.

3 *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9<sup>th</sup> Cir. 2003). "An employee's speech is protected  
4 under the First Amendment if it addresses 'a matter of legitimate public concern.'" 320 F.3d at 973.

5 To constitute an adverse employment action, a government act of retaliation  
6 need not be severe and it need not be of a certain kind. Nor does it matter whether an  
act of retaliation is in the form of the removal of a benefit or the imposition of a  
burden.

7 *Id.* at 975. If the alleged retaliatory action is so insignificant that it does not deter the exercise of  
8 First Amendment rights, it does not constitute an adverse employment action. *Id.* For example, in  
9 *Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (9<sup>th</sup> Cir. 1998), the plaintiff had only shown "that  
10 he was bad-mouthed and verbally threatened."

11 *Keyser v. Sacramento City Unified School District* 265 F.3d 741 (9<sup>th</sup> Cir. 2001) listed three  
12 ways that a plaintiff can show that retaliation was a substantial or motivating factor behind a  
13 defendant's adverse employment actions:

14 First, a plaintiff can introduce evidence regarding the " 'proximity in time between the  
15 protected action and the allegedly retaliatory employment decision,' " from which a "  
16 'jury logically could infer [that the plaintiff] was terminated in retaliation for his  
speech.' " [citations omitted.] Second, a plaintiff can introduce evidence that "his  
17 employer expressed opposition to his speech, either to him or to others." [citation  
omitted.] Third, the plaintiff can introduce evidence that "his employer's proffered  
18 explanations for the adverse employment action were false and pretextual."

19 *Coszalter*, 320 F.3d at 977. Three to eight months, depending on the circumstances, was held to be  
20 within the time frame giving rise to the inference of retaliation. *Id.* Inconsistent application of a  
policy can be evidence of pretext. *Id.* at 978.

21 Once it is determined that a plaintiff has engaged in protected speech, the Court must balance  
22 the employer's interest in fulfilling its public responsibilities and Bundy's First Amendment speech  
23 rights. This test requires the following inquiry as to whether the speech:

24 (i) impairs discipline or control by supervisors, (ii) disrupts co-worker relations, (iii)  
25 erodes a close personal relationship premised on personal loyalty and confidentiality,

1 (iv) interferes with the speaker's performance of his or her duties, or (v) obstructs the  
routine operation of the office.

2 *Rendish v. City of Tacoma*, 123 F.3d 1216 (9<sup>th</sup> Cir. 1998), *cert. denied* 524 U.S. 952 (1998).

3 The City assumes for the purposes of its motion that Bundy's police report constitutes a  
4 matter of public concern, and Bundy argues that his speech is protected because it involves the  
5 perceived wrongdoing of another police officer.

6 Bundy contends that he was subjected to an adverse employment action. In his Declaration  
7 at pages 11 – 12, he details twelve ways in which he was refused training and promotion  
8 opportunities owing to ineligibility because of the Internal Affairs investigation. For example, he  
9 states that because he was the subject of an Internal Affairs investigation, he was taken off the Field  
10 Training Officer eligibility list, the Search and Rescue eligibility list, received a five-year reprimand  
11 for unsatisfactory performance (making him ineligible for promotion), and that Blystone told sectors  
12 one and two that Bundy was not to show up on any of his scenes.

13 Bundy contends that his speech was a motivating factor for the adverse employment actions  
14 taken and that he has shown this in all three ways outlined in *Coszalter*. Bundy contends that when  
15 he got back to the station after the incident with Pardini, he was informed that Sgt. Blystone had put  
16 Bundy's report in his desk drawer and several other sergeants had read it. [Bundy Decl. p. 10.]  
17 While he was being informed of this, he was asked to report to Lt. Justice and was informed of the  
18 Internal Affairs complaint initiated by Sgt. Blystone. *Id.* Moreover, Bundy contends that his whistle  
19 blower report was not being investigated, that only the complaint by Blystone against him was being  
20 investigated. *Id.* Finally, Bundy asserts the inappropriateness of Blystone's transfer to Internal  
21 Affairs where he was reviewing tapes of the investigation against Bundy. *Id.* p. 11.

22 The City does not specifically address these contentions, but argues that under the balancing  
23 test, "each of the foregoing considerations has been realized as a result of Bundy's inaccurate report  
24 and assertion of allegations proven by the IA investigation to be unsupported." The City points to  
25 Bundy's statement that not everyone has taken his side, but some have taken Blystone's side and

1 “they polarized this particular incident.” [City memorandum, p. 20.] The City argues that close  
2 working relationships have been eroded, and that the TPD has an interest in effectively managing its  
3 operations and disciplining officers who violate its policies. The City also argues that the TPD also  
4 has an interest in having its officers submit factually accurate reports, and that in the Internal Affairs  
5 investigation, officers at the scene did not corroborate Bundy’s implication that Blystone may have  
6 accepted a bribe. [Ramsdell Decl., Ex. 3.] Requiring a factually accurate police report does not  
7 violate First Amendment rights, and the TPD could not function if police officers could disregard  
8 factual accuracy. Additionally, the City argues that TPD has a legitimate interest in ensuring that  
9 lawful orders of its superior officers will be followed and the chain of command respected, a concept  
10 acknowledge by Bundy. [Bundy Dep. p. 124:17 – 125:3.] The insubordinate conduct at issue is the  
11 allegation that before Pardini left the scene, Bundy spoke to him as follows:

12 I don’t know why my sergeant wants me to do this, but he does. ... You’re gonna get  
13 to go home tonight. ... But this is not the way I would handle this if I was left in my  
14 own decision. ... You’d be going to jail, ah, so would your wife. ... I just want you to  
15 know I’m following orders, and that tonight is your lucky night.

16 [Ramsdell Decl., p. 48; Bundy Dep. pp. 103:23 – 104:9.]

17 Thus, the City reiterates that Bundy’s discipline stemmed from his failure to submit a  
18 factually accurate report and from his insubordination, and that Bundy’s interest in such speech does  
19 not exceed TPD’s legitimate and compelling interests set forth above.

## 20 CONCLUSION


21 Bundy has made a sufficient showing in support of his claim on the First Amendment issue to  
22 defeat the City’s Motion for Summary Judgment. There are genuine issues of material fact that  
23 preclude the Court from determining the issues of law discussed above. Having decided that  
24 summary judgment will be denied on the federal claim, summary judgment on the state claims will be  
25 denied as well.

26 ACCORDINGLY,

ORDER - 7

1 IT IS ORDERED: The City of Tacoma's Motion for Summary Judgment Against Third-  
2 Party Plaintiff's Joseph Bundy and Pamela Rush [Dkt. # 45] is DENIED.

3  
4 DATED August 29, 2005.

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6 FRANKLIN D. BURGESS  
7 UNITED STATES DISTRICT JUDGE  
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